TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1031.

THE UNITED STATES, APPELLANTS,

vs.

JOHN T. MORRISON.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 2, 1878.

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1 United States Court of Claims.

JOHN T. MORRISON
vs.
THE UNITED STATES. } No. 11562.

I. *Claimant's petition.—Filed March* 19, 1877. *J. R.*

To the honorable Court of Claims:

The claimant was a quartermaster in the 10th regiment of cavalry, in the Army of the United States, from the 1st day of November, 1875, until the 23rd day of November, 1876, and during that whole period of time served as acting assistant commissary of subsistence; and the claimant thereby became entitled by law to compensation at the rate of one hundred dollars per year, in addition to the pay of regimental quartermaster, and such additional compensation amounted to the sum of $106\frac{30}{100}$; no part of which has ever been paid.

2 There is due to the claimant from the defendant, by reason of the premises, the sum of $106\frac{30}{100}$.

No action has been had in any of the executive departments or by Congress on this claim, of which the claimant is sole owner; and no assignment or transfer of the same, or of any part thereof, or interest therein, has ever been made.

The claimant is a citizen of the United States, and he has not in any way aided, abetted, or given encouragement to rebellion against the said government; and he is justly entitled to the amount of this claim, after allowing just credits and offsets.

The claimant demands judgment against the United States for the sum of $106\frac{30}{100}$.

PAINE & GRAFTON,
Claimant's Attorney.

3 DISTRICT OF COLUMBIA, *ss:*

Benj. F. Grafton, having been duly sworn, on his said oath says that he is one of the attorneys of the claimant named in the foregoing petition, and believes the facts as stated in the said petition to be true.

B. F. GRAFTON.

Sworn and subscribed before me this 19th day of March, 1877.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

4 II. *Completed petition.—Filed May* 9, 1877.

To the honorable Court of Claims:

The petition of John T. Morrison, quartermaster of the 10th regiment of cavalry, United States Army.

The claimant was quartermaster of the 10th regiment of cavalry, in the Army of the United States, from November 1, 1875, to February 28, 1877, and during that whole period of time served as acting assistant commissary of subsistence, and became entitled by law to compensation for such service at the rate of $100 per annum, in addition to the pay of regimental quartermaster. No part of such additional compensation has been paid.

There is due to the claimant from the defendant, by reason of the premises, the sum of $133.33.

No action has been had by any of the executive departments or by Congress on this claim, of which the claimant is the sole owner; and no assignment or transfer of the same, or of any part thereof, or interest therein, has ever been made.

The claimant is a citizen of the United States, and has at all times borne true allegiance to the Government of the United States, and has not in any way aided, abetted, or given encouragement to rebellion against the said government; and he is justly entitled to the amount of this claim, after allowing all just credits and offsets.

The claimant demands judgment against the United States for the sum of $133.33.

PAINE & GRAFTON,
Claimant's Attorneys.

THE DISTRICT OF COLUMBIA, *ss:*

Benj. F. Grafton, having been duly sworn, says that he is one of the attorneys of the claimant named in the foregoing petition, and believes the facts as stated in said petition to be true.

BENJ. F. GRAFTON.

Sworn to and subscribed before me, by B. F. Grafton, this 9th day of May, 1877.

[L. S.] SAM'L C. MILLS,
Notary Public.

Claimant's post-office address, Fort Concho, Texas.
Claimant's attorneys, Paine & Grafton, Washington, D. C.

6 III. *Traverse.—Filed December* 3, 1877.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimant herein; and not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of one hundred and thirty-three dollars and thirty-three cents, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, denies the said allegation.

THOMAS SIMONS,
Assistant Attorney-General.

7 IV. *Findings of fact and conclusion of law.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

1. The claimant was appointed by the President, by and with the advice and consent of the Senate, first lieutenant in the Tenth Regiment of Cavalry, June 11, 1868.

2. On the 31st of May, 1875, he was appointed regimental quartermaster by the following order:

"HEADQUARTERS TENTH CAVALRY,
"*Fort Concho, Texas, May* 31, 1875.

"General Orders No. 5.]

"First Lieut. John T. Morrison, 10th Cavalry, is, subject to the ap-

proval of the Secretary of War, hereby appointed regimental quartermaster (vice Beck resigned), to take effect January 1, 1875.

By order of Colonel B. H. Grierson.

"S. L. WOODWARD,
"*1st Lieu. 10th Cavalry, Adjutant.*"

This order was approved by the Secretary of War June 14, 1875, to take effect when said Morrison should report for duty in person; and he reported and was assigned to duty June 30, 1875.

3. On the 22d of October, 1875, he was ordered to act as assistant commissary by a general order, of which the following is a copy:

"HEADQUARTERS FORT CONCHO, TEXAS,
"*October* 22, 1875.

"General Orders No. 26.]

"First Lieu. J. T. Morrison, reg. quart'master 10th Cavalry, is, in addition to his other duties, hereby assigned to duty as assistant commissary of post, relieving 1st Lieu. Charles L. Cooper, 10th Cavalry, to whom he will receipt for all public funds, property, &c., for which he is responsible. This transfer to date the 31st instant.

"By order of Colonel B. H. Grierson.

"CHARLES L. COOPER,
"*1st Lieu. Cavalry, Post-Adjutant.*"

4. Under said General Order No. 26, said claimant performed duty as acting assistant commissary from November 1, 1875, to and including February 28, 1877.

5. The claimant has been paid his salary as regimental quartermaster, but has been paid nothing for the additional duties performed by him as acting assistant commissary.

8 Additional finding made at request of claimant.

6. On the 30th of June, 1875, Levi P. Hunt, second lieutenant Tenth Cavalry, was promoted to be first lieutenant in that regiment, in place of First Lieut. John T. Morrison, appointed regimental quartermaster, and was commissioned accordingly.

RICHARDSON, J., delivered the opinion of the court:

This case is understood to be a class case, the final decision of which, settling the construction of a statute under which many officers of the Army are paid, renders it of importance to others than the present claimant, and involves pecuniary interests beyond the amount here in controversy.

The claimant was regimental quartermaster of the Tenth Regiment of Cavalry, and as such officer received the salary of $1,800 a year, to which he was entitled by Revised Statutes, section 1261.

On the 22d of October, 1875, he was assigned to duty as assistant commissary of post, "in addition to his other duties," and was made responsible for all public funds, property, &c., which he should receive in that capacity, and by virtue of that assignment he served as acting assistant commissary from November 1, 1875, to February 28, 1877. For the performance of the additional duties to which he was thus assigned he has not been paid, and now brings this action to recover payment therefor, at the rate of $100 a year, under the provision of the Revised Statutes, section 1261, allowing that compensation to an acting assistant commissary in addition to the pay of his rank.

On the part of the United States two objections to the claimant's right of recovery are presented, and upon those objections the defense of the case rests.

First. It is contended that the pay of the claimant's rank was $1,600 a year, and that, as he has received $1,800 as quartermaster, he has already been paid more than he would be entitled to by adding the $100 allowed for his services as acting assistant commissary to the pay of his rank.

Second. The Army Regulations, published in 1863, article No. 1345, p. 351, provide that "no officer shall receive pay for two staff appointments for the same time," and it is insisted that the claimant was holding a second staff appointment in performing the duties of assistant commissary, for which, by that regulation, he was excluded from having any compensation in addition to his salary as a staff officer under his appointment as a regimental quartermaster.

We are all of opinion that neither of these grounds of defense is tenable.

The Revised Statutes, in section 1102, provide that "the adjutant and quartermasters of each regiment (of cavalry) shall be extra lieutenants, selected from the first or second lieutenants of the regiment," and the claimant was so selected.

By section 1261 there are several grades of pay for lieutenants: First lieutenant, mounted, $1,600; not mounted, $1,500. Second lieutenant, mounted, $1,500; not mounted, $1,400. Regimental quartermaster (who is an extra lieutenant), whether first or second lieutenant, and whether mounted or not mounted, $1,800.

The claimant was entitled to and received no other "pay of his rank" than that allowed to him as quartermaster, $1,800 a year; not $1,600 as first lieutenant, mounted, and $200 extra for additional services as quartermaster, as claimed by defendants.

9 *Conclusion of law.*

The claimant is entitled to recover $133.33 for the reasons stated in the opinion.

V. *Opinion of the court.*

The compensation of quartermaster is, by statute, a fixed salary, an entire sum, allowed to his rank, according to the duties which he is appointed to perform.

In like manner, by the same section of the Revised Statutes, a first lieutenant, unmounted, is allowed $1,500, and mounted, $1,600; not $1,500 as the pay of his rank as first lieutenant, with $100 extra for being mounted. And the same difference of salary is made between second lieutenants mounted and those not mounted. And so if either becomes a quartermaster he is an extra lieutenant, and a still different salary is allowed to him. In either case the amount is not made up of items, but is one indivisible sum, the pay of his rank.

Before the passage of the act of July 15, 1870, ch. 294, section 24 (16 Stat., 320), now Revised Statutes, section 1261 above cited, quartermasters were not paid as they now are, but received, first, fixed salaries as subalterns, with $5 or $25, or $10 and forage, or $10 and forage for two horses monthly, in addition to their "regimental pay" or "pay in the line." (Act of April 30, 1790, ch. 10, sections 5, 6, 1 Stat., 120; act of May 30, 1796, ch. 30, section 12, 1 Stat., 484; act of March 3,

1799, ch. 48, 1 Stat., 750; act of February 11, 1847, ch. 8, section 4, 9 Stat., 124.) And the arguments for the defendants are founded entirely upon departmental rulings which were established (whether correct or not it is unnecessary now to determine) under laws which are no longer in force, and which have given place to a new policy by the law-making power as to the pay of quartermasters, making it a fixed salary attached to their rank and appointment, instead of a rate of pay made up by computation for separate services, and without any additional compensation as such for the performance of their distinct duties as quartermasters as before.

As to the Army regulation that "no officer shall receive pay for two staff appointments for the same time," we are of opinion that it has no application to such a case as this of the claimant, who neither held nor claimed the pay of two staff appointments. There is no such staff officer attached to a regiment or post, or elsewhere in the Army, as "assistant commissary," whose appointment is provided for by law, while the statutes are explicit as to what officers the Army shall consist of. (Revised Statutes, sections 1094–1110.)

Section 1140 of the Revised Statutes provides for a Subsistence Department, to consist of one Commissary-General, four assistant commissaries-general, and sixteen commissaries, with different rank, from captain to brigadier-general, and they all belong to the general staff of the commander-in-chief, and none are assigned to regiments. (Revised Statutes, section 1102.)

Nor did the claimant have any appointment as "assistant commissary." By that designation he was assigned to special duty by the commander of his regiment; that is, was detailed to assist the commissaries; but that did not constitute him a staff officer on the general staff of the commander-in chief in the Commissary Department, nor give him a staff appointment in his regiment, which is not by law entitled to an assistant commissary. He held but one staff appointment, that of quartermaster, and the fact that he was assigned to perform some of the duties of another staff officer of much higher rank and pay did not place him in the position of holding two staff appointments.

The statute provision in Revised Statutes, section 1261, allowing $100 a year to an acting assistant commissary in addition to the pay of his rank, does not establish the office of assistant or acting assistant commissary, in the absence of any other provision for the appointment or assignment to duty of such an officer. The amount of compensation would seem sufficiently to indicate that such was not the intention of Congress.

The Army Regulations relied upon by the defendants were approved by the President and promulgated by the Secretary of War August 10, 1861, and were published with additions and alterations in 1863. By the act of July 28, 1866, ch. 299, section 37 (14 Stat., 337), Congress directed a new code to be prepared and reported, and provided that "the existing regulation to remain in force until Congress shall have acted on said report." A report was subsequently made but never acted upon.

When the Revised Statutes were framed, section 37 of act of 1866, ch. 299, was omitted, while the rest of the act, or all that was supposed to be in force, was incorporated therein. By section 5596 of the revision it is provided that "all acts of Congress passed prior to said 1st day of December, 1873, any portion of which is embraced in the revision, are hereby repealed."

What is the present status of these regulations, and whether or not

they now have the force of law, it is not necessary to decide, because, in our opinion, the one relied upon by the defendants does not apply to the claimant's case, and if so intended when made in 1861, or when confirmed by Congress in 1866, it would not control an express provision of statute enacted in 1870 and still found in the Revised Statutes.

For such additional duties, involving great responsibilities and risks, as those to which the claimant was assigned as "acting assistant commissary," the statute expressly allows a compensation at the rate of $100 a year, and the claimant will have judgment for $133.33.

LORING, J., not now present in court, took part in the consideration of this case, has read this opinion, and concurs therein.

NOTT, J., was not present when the case was submitted, and took no part in the decision.

11 VI. *Final judgment.*

At a Court of Claims held at the Capitol, in the city of Washington, the 26th day of December, A. D. 1877, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said John T. Morrison, claimant, do have and recover of and from the United States the sum of one hundred and thirty three dollars and thirty-three cents ($133\frac{33}{100}$).

12 VII. *Application for appeal and order allowing same.*

From the judgment rendered in the above-entitled cause on 26th day of Dec., 1877, in favor of claimant, the defendants, by their Attorney General, on the 26th day of December, 1877, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Attorney General.

A. D. R.

Filed Dec. 26, 1877.

Ordered, That the appeal be allowed as prayed for.

13 In the Court of Claims.

JOHN T. MORRISON
vs.
THE UNITED STATES. } No. 11562.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above entitled cause; of the findings of fact by the court, and the conclusion of law thereon; of the opinion of the court; of the final judgment by the court; of the application of the Attorney General for the allowance of an appeal to the Supreme Court of the United States, and of the order allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this thirty-first day of December, 1877.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) No. 1031. The United States, appellants, vs. John T. Morrison. Court of Claims. Filed 2d January, 1878.

Supreme Court United States.

OCTOBER TERM 1877.

No. 1031.

THE UNITED STATES, Appellants.

vs.

JOHN T. MORRISON.

APPEAL FROM THE COURT OF CLAIMS.

SUBMITTED UNDER RULE XX.

ARGUMENT FOR UNITED STATES.

Thomas McGill & Co., Printers, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1877.

No. 1031.

THE UNITED STATES, APPELLANTS,

vs.

JOHN T. MORRISON.

Appeal from the Court of Claims.

SUBMITTED UNDER RULE XX.

Argument for United States.

STATEMENT.

June 11, 1868, claimant was duly appointed a first lieutenant of cavalry. May 31, 1875, he was designated as regimental quartermaster, which designation was approved by the Secretary of War, and he was assigned to duty June 30, 1875. A second lieutenant was promoted, and took his place as first lieutenant of the Tenth Cavalry. October 22, 1875, he was ordered by Col. B. H. Grierson, by General Order No. 26, to act as assistant commissary of the post, and performed the duties of that position for sixteen months, from November 1, 1875, to March 1, 1877. He has been paid as regimental quartermaster, but has received nothing for the additional

By act of July 17, 1862, ch. 201, § 11, (12 Stat., 599,) cavalry regiments to have adjutant, quartermaster, and commissary, *to be taken from the regiment.*

By act of March 3, 1863, ch. 75, (12 Stat., 731, sec. 37,) the pay of regimental commissary was made the same as regimental quartermaster.

Then comes the act of July 15, 1870, ch. 294, § 24, providing for the pay of regimental quartermasters at $1,800 a year; of first lieutenant, mounted, $1,600—not mounted, $1,500; second lieutenant, mounted, $1,500—not mounted, $1,400; and acting assistant commissary, $100 in addition to pay of his rank. (16 Stat., 320, middle.)

Next come the R. S., sec. 1102, providing for regimental quartermasters and adjutants of cavalry to be *extra* lieutenants, selected from the first and second lieutenants of the regiment. Each company of cavalry to consist of one first and one second lieutenant.

The first appointment of commissaries of subsistence was by act of March 21, 1821, ch. 13, § 8, (3 Stat., 615,) which provided for commissary general, and not exceeding fifty assistant commissaries, to be taken from the subalterns of the line, to receive, in addition to their pay in the line, not less than $10 nor more than $20 per month; *the assistant quartermasters and commissaries to be subject to duty in both departments.*

By act of March 2, 1827, ch. 42, each captain and subaltern was to be allowed one additional ration; but no subaltern should be allowed this *while in the performance of any staff duty for which he received an extra compensation.* (4 Stat., 227.)

Four additional commissaries of subsistence were provided for by the act of September 26, 1850, ch. 70, § 1, "to be taken from the line of the army." (9 Stat., 469.)

Section 1140 of Rev. Stats. provides for eight commissaries of subsistence, with rank of major of cavalry.

Section 1132 provides for twelve quartermasters and thirty assistant quartermasters.

Section 1261 provides for pay of regimental quartermaster

and first and second lieutenants, and of acting assistant commissary, the same as the act of July 15, 1870, above cited.

We deduce from all these laws the following results:

That when the services of a commissary are needed with a command, and cannot be furnished by the Commissary-General, the commanding officer may detail an officer *from the line* to perform such service, for which he shall receive at the rate of $100 a year in addition to his pay *in the line*.

That regimental quartermasters are selected from the lieutenants of some company of the regiment, which companies are only entitled to one first lieutenant and one second lieutenant, except, if one of those is selected for quartermaster, the company may have another, and the quartermaster becomes an extra lieutenant to that company, which will then have three lieutenants instead of two; and whenever the office of quartermaster should be abolished, or the services of said officer no longer needed, he returns to his post and duties as one of the lieutenants of his company.

I can find no law or regulation that officers so selected become permanent quartermasters, as claimed by the petitioner.

Counsel admit that it was different under the old law. But the regimental quartermaster and commissary were noted on the records, under the old law, with the pay of lieutenant, and $10 in addition, the same as now noted under the Revised Statutes as $1,800. (See Army Reg. of 1863, p. 545.) The office was therefore then *recognized* as much as in the Revised Statutes.

It will be noted that the office of regimental quartermaster is provided for in the Revised Statutes in the same manner as before, and made no more permanent than before; and the only change is that it says his pay shall be $1,800—that is, the duties of such an office are always important, and oftentimes laborious, and instead of giving the incumbent the regular pay of his rank (which may be from infantry) and $100 in addition, he shall have $1,800 in any contingency. But, as to commissary, the law is supposed to say there may be

times when the quartermaster cannot properly attend to the duties of both quartermaster and subsistence officer; and when he cannot, an officer from the line may be detailed for that purpose.

As the pay of assistant commissary is provided for as fully as that of quartermaster, therefore claimant would be holding two staff appointments at the same time, for which he can only receive pay of one. (Rev. Reg., 1863, sec. 1345, p. 351.) He has elected to be paid as quartermaster.

In the absence of the chief of any bureau, another officer may be empowered to take charge in his absence, *but to have no additional compensation.* (5 Stat., 127.)

The difficulties suggested in claimant's brief, with reference "to pay of his rank," are all imaginary. It is all very simple.

The word "rank" undoubtedly is intended to cover the particular office, and also *the arm of the service* of which he is an officer.

If he is first lieutenant of infantry, he will have his regular pay, $1,500, and $100 additional. If cavalry, his regular pay, $1,600, and $100 *additional, and so on.* An officer, whose compensation is fixed by law, cannot receive any additional pay for any other service, unless authorized by law and a special *appropriation* made for it. (5 Stat., 512; Digest Second Comptroller, 1869, p. 72, sec. 515.) An officer cannot be allowed *extra* for more than one service at the same time. (Same Digest, p. 165, sec. 1207.)

I here introduce and make part of my argument the opinion of the Commissary-General on the question at issue.

"The law, section 24, act of July 15, 1870, section 1261, Rev. Stat. United States, allows an acting assistant commissary of subsistence $100 per annum in addition to the pay of his rank. 'This law is held to apply to subalterns of whatever branch of the service, and to them only: *Provided*, as against a lieutenant and regimental quartermaster, * * * extra compensation is not received by the officer for the same time for any other staff duty. (Decision of Secretary of War, October 29, 1853; decision of Second Comptroller, April 19, 1874; par. 1345, Revised Army Regulations,

1863.) Payment to be made upon the certificate of the Commissary General of Subsistence as to the fact and period of service.' (Par. No. VI, circular No. 101, series of 1874, Paymaster-General's Office.) See also par. No. 64, p. 11, Second Comptroller's Digest, edition of 1865. Decided, 'that a regimental quartermaster who performs the duties of his own office and those of an assistant commissary at the same time, may be paid the additional allowance of either of these officers that he may elect, but not of both.'

"In this connection, it is submitted that the rank of a regimental quartermaster is that of lieutenant, and his pay $1,800 per annum, or $200 per annum in addition to his pay as a lieutenant. If the law was intended to authorize an additional compensation to a lieutenant acting as an assistant commissary, who, by reason of being a regimental quartermaster, is already receiving an extra compensation for performing staff duty, it is presumed that such intention would have been specifically stated therein."

The court will observe that the decision of the Secretary of War, cited above, was on a question precisely like this case, as to whether or not a regimental quartermaster, who was entitled to pay additional to his pay in the line, could receive *further* pay for *other extra* service; and the decision of the Second Comptroller was upon a statute precisely like the one under consideration. No decision of the Comptroller or Secretary has since been found to the contrary, nor intimation of Congress that such is not the correct interpretation.

This construction may, therefore, be presumed to be in accordance with the intent of Congress, as it is shown by the acts and regulations above referred to, to be the true policy of the Government in no case to pay *two extra* compensations to the same officer for services performed at the same time.

Why should officers have extra pay under *any circumstances*, except through the *kindness* and *bounty* of the Government? They are in the employ of the Government for the whole twenty-four hours of every day. Their whole service is due to the Government, and at such employment as shall be ordered. An officer may be with his company, or on court-martial, or on quartermaster's board of survey, or de-

tached to guard a very important and dangerous position, or sent in command of a large and valuable train, and various other duties, which may be much more laborious and difficult and unpleasant than his duties with his company, but he receives no extra compensation for it; and because Congress, in its *kindness*, sees fit to allow extra pay in certain cases, this *favor* should not be extended to other cases *not especially* authorized by law, more particularly when, as in this case, its allowance would be contrary to the policy of the Government from its foundation, so far as it can be gathered from the laws and practice.

The laws herein cited can be readily referred to in the compilation of "United States Military Laws, 1776 to 1864."

The opinion of the Paymaster-General, giving his reasons for withholding the pay here sought to be recovered, is annexed as an appendix to this hastily-prepared brief.

EDWIN B. SMITH,
Assistant Attorney-General.

APPENDIX.

The Paymaster-General's Opinion as to the Pay of Acting Assistant Commissaries.

The provision of law in section 24, act July 15, 1870, fixing the pay of "an Acting Assistant Commissary of Subsistence at one hundred dollars per annum in addition to pay of his rank," cannot be disjoined from prior laws and the special provisions in the official Army Regulations, by which this office has long been established and declared entitled to every additional pay.

The law above mentioned (Sect. 24, act July 15, 1870) is in all respects and exclusively a *pay* law. It quotes the several grades and special staff officers of *Commissioned* officers, (and of those only,) as then existing, solely for the purpose of applying to those grades and staff officers a new rate of salaried pay in place of the old system of monthly pay and allowances. The legal status of each officer is just what it was by preëxisting laws and Regulations, these being as properly applicable to the case of an Acting Assistant Commissary as to the General of the Army, an Adjutant, or an Aid-de-Camp. In other words, the law (sec. 24) evidently did not touch the status of any grade or office as to rank or mode of appointment; but, leaving all as then fixed, simply applied a new compensation to each.

Two other examples in the law, besides that of Acting Assistant Commissary, show its evident purport in regard to this functionary as follows: "The pay of an Aid-de-Camp to Major-General shall be $200 per annum *in addition to pay of his rank*;" and again: "The pay of an Aid-de-Camp to Brigadier-General shall be $150 per annum *in addition to pay of his rank*." What is the rank of an Aid-de-Camp in each of these cases? Certainly it was not intended in a *pay* law, by

the use of the words "in addition to pay of his rank," to disturb preëxisting laws and Regulations under which Captains and Lieutenants only were subject to selection as aids to General officers, and to open to them, at their will, the selection from higher grades.

It is in words of like import that the same law provides that "the existing pay of an Acting Assistant Commissary shall be $100 [per annum] *in addition to pay of his rank*." This language no more takes this office from dependence upon the prior laws and Regulations which have for so many years governed its appointment and exercise, than it does the Aid-de-Camp, or, in fine, any other of the grades or offices.

What, then, are the laws, Regulations, and authoritative decisions which limit the grade or grades from which an Acting Assistant Commissary shall be selected? The answer is, *from Subalterns of the line*.

The Subsistence Department, as originally constituted, was organized by the 6th section of the act of April 14, 1818, and regulated by its 7th, 8th, 9th, and 10th sections. By this act the President was empowered to appoint "as many Assistant Commissaries, *to be taken from the Subalterns of the line*, as the service may require, they to receive $20 per month in addition to their pay in the line."

This law, of limited duration, was varied by the 8th section of the Act of March 2, 1821, which was a permanent provision, limiting, however, the number of Assistant Commissaries to *fifty*, and limiting the pay at not less than $10 nor more than $20 per month. This latter law has never been repealed nor superseded by any subsequent law; in the words of the Attorney-General of the United States, it "is yet, [1835,] by virtue of its original enactment as a permanent law, in full force." (Opin. Atty.-Gen., V. 3, pp. 86, 87.) It is, moreover, to this day unrepealed; see par. 38, p. 13, General Army Regulations, Edition of 1863—"the senior Lieutenant present holding the appointment of Assistant Commissary of Subsistence, is entitled to perform the duties." See also all the forms of Returns in Regulations of the Subsistence Department, providing for their signature by an

Assistant Commissary. See also table of the pay of officers, page 359, General Army Regulations of 1863, announcing the pay of *Assistant Commissary* of Subsistence, in addition to pay, &c., of Lieutenant at $20 per month.

But, admitting this to be true in regard to Assistant Commissaries, how is it that none are now appointed, and have not been for years? And why should acting Assistants have been appointed, and for many years past have been allowed the extra pay awarded by law only to the Assistant Commissary?

The appointments of both Assistant and *Acting* Assistants under the original law of 1818, seem to have been nearly simultaneous with the rate of monthly pay to each. The official Army Regulations of 1820, page 118, announced the following: "When troops are detached to points where there is no Assistant Commissary of Subsistence, the Commanding Officer of the Post on detachment may appoint an officer to do that duty, who will, while acting, be entitled to the additional pay of an Assistant Commissary of Subsistence; but, as such appointments are only made to meet the casualties of the service, the officer thus appointed will not be considered on pay after he has ceased to perform the duties." (See also General Army Regulations of 1835, par. 19, p. 185; also General order No. 61, September 20, 1837; also General Army Regulations of 1841, par. 1101, p. 261, and par. 1104, p. 262; also Secretary of War's Decisions, January 18, 1841, and June 1, 1853, that any *Subaltern* who temporarily performs, duty and certified by the Commissary General, shall be paid.)

The Subsistence Regulations of the Army, Edition of 1847, announces this Regulation: "*Subalterns* acting as Assistant Commissary of Subsistence for not less than one month, may receive the extra compensation, (of $20 per month, less one ration,) on the certificate of the Commissary General of Subsistence, provided the officer's returns and accounts have been properly rendered for the time charged."

It was probably then, as it is now, utterly impracticable to confine the performance of the duties of Assistant Commis-

saries to fifty subalterns, to be appointed by the President, and hence, in process of time, the discontinuance of appointment of Assistants, and the dependence of the military authorities exclusively upon the *acting* appointments, as the immediate exigencies of the public service should demand.

It is probably the fact that in isolated cases the practice by the Military authorities had been to allow any officer who, by the order of a Superior, performed the duties of Acting Assistant Commissary, pay for the time he was so engaged. These cases are, however, exceptional. But upon the decision of the Comptroller of the Treasury, that such only could be paid as shall have been appointed under the 8th section of the Act of 1821, the practice has undoubtedly been to confine the appointments to Subaltern officers alone. See Comptroller's Digest, Ed. 1869, par. 100, p. 15: "*Subalterns* acting as Assistant Commissaries of Subsistence for not less than one month, may receive the extra compensation of $20 per month, less one ration per day, on the certificate of the Commissary General, provided the officer's returns and accounts shall have been properly rendered for the time charged. When the Commissary General declines giving the certificate, the officer cannot be paid.

Comptroller Phelps, a sound lawyer, wrote a letter on the 10th September, 1852, expressing the opinion that the payment of $20 per month to Acting Assistant Commissaries was not authorized by law; but that, as the contrary decision of Secretary Poinsett, in 1841, had been acquiesced in, he did not propose to disturb it. He added: "It clearly follows however, that if Acting Assistant Commissaries are within the provisions of this act, (April 14, 1818,) so as to entitle them to the extra compensation, *they are also within its restriction which requires them to be appointed from Subalterns in the line of the Army.*"

Under all this array of facts, showing so conclusively that the 8th section of the Act of March 2, 1821, has been held to be unrepealed, that Acting Assistant Commissaries, as the substitutes of the Assistants, have been appointed as under the provisions of that law from Subalterns exclusively, and

that the new pay law of July 15, 1870, does not undertake to change the laws and rules of appointment of any office or grade therein named,—this Department must hold that no officer above the grade of First Lieutenant is entitled to charge for or to receive the additional pay of $100 per annum for acting as Assistant Commissary.

The claimant herewith, Captain J. G. C. Lee, U. S. Quartermaster's Department, is himself excluded, whatever may be the ruling in respect to other officers not of the staff.

Paragraph 1,345, General Army Regulations of 1863, p. 351, is in these words:

"No officer shall receive pay for two staff commissions at the same time."

He is, therefore, by virtue of "his staff appointment in the Quartermaster Department, prohibited receiving the pay of acting assistant commissary. Moreover, he is required by the 8th section of the act of March 2, 1821, still unrepealed, to perform this very duty, without additional compensation; and that the assistant quartermasters and assistant commissaries shall be subject to duties in both departments, under the orders of the Secretary of War."

The Commissary General is believed to be in error in his opinion that under the 24th section of the act of July 15, 1870, "any non-commissioned officer or soldier who performs the duty indicated in the clause establishing the rate of pay for an *acting assistant commissary* is entitled to the pay therefor." The law, sec. 24, declares in the first two lines "that the pay of the *officers of the army* shall be as follows:" From beginning to end of sec. 24 it is a category of officers—commissioned officers alone—and they only can receive the additional pay.

B. W. Brice,
Paymaster-General.

Paymaster-General's Office, *July* 18, 1871.

Supreme Court United States.

OCTOBER TERM, 1877.

No. 1031.

THE UNITED STATES, Appellants,

vs.

JOHN T. MORRISON, Appellee.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

PAINE & GRAFTON,

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Thomas McGill & Co., Printers, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1877. No. 1031.

THE UNITED STATES, Appellants,

vs.

JOHN T. MORRISON, Appellee.

Appeal from Court of Claims.

BRIEF FOR APPELLEE.

STATEMENT.

The facts are fully shown in the findings of the court, as follows:

The case having been heard before the court of claims, the court, upon the evidence, finds the facts to be as follows:

1. The claimant was appointed by the President, by and with the advice and consent of the senate, first lieutenant in the tenth regiment of cavalry, June 11, 1868.

2. On the 31st of May, 1875, he was appointed regimental quartermaster, by the following order:

"HEADQUARTERS TENTH CAVALRY,
"*Fort Concho, Texas, May* 31, 1875.

"General Orders No. 5.]

"First Lieut. John T. Morrison, 10th Cavalry, is, subject to the approval of the Secretary of War, hereby appointed regimental quartermaster (*vice* Beck, resigned) to take effect January 1, 1875.

"By order of Colonel B. H. Grierson.

"S. L. WOODWARD,
"1*st Lieu. 10th Cavalry, Adjutant.*"

This order was approved by the Secretary of War, June, 14, 1875, to take effect when said Morrison should report for duty in person; and he reported and was assigned to duty June 30, 1875.

3. On the 22d of October, 1875, he was ordered to act as assistant commissary, by a general order, of which the following is a copy:

"HEADQUARTERS FORT CONCHO, TEXAS,
"*October* 22, 1875.

"General Orders No. 26.]

"First Lieu. J. T. Morrison, reg. quart'master 10th Cavalry, is, in addition to his other duties, hereby as signed to duty as assistant commissary of post, relieving 1st Lieu. Charles L. Cooper, 10th Cavalry, to whom he will receipt for all public funds, property, &c., for which he is responsible. This transfer to date the 31st instant.

"By order of Colonel B. H. Grierson.

"CHARLES L. COOPER,
"*1st Lieu. Cavalry, Post-Adjutant.*"

4. Under said General Order No. 26, said claimant performed duty as acting assistant commissary from November 1, 1875, to and including February 28, 1877.

5. The claimant has been paid his salary as regimental quartermaster, but has been paid nothing for the additional duties performed by him as acting assistant commissary.

Additional finding made at request of claimant.

6. On the 30th of June, 1875, Levi P. Hunt, second lieutenant Tenth Cavalry, was promoted to be first lieutenant in that regiment, in place of First Lieut. John T. Morrison, appointed regimental quartermaster, and was commissioned accordingly.

ARGUMENT.

The following provisions of the Revised Statutes fix the pay of the officers of the army:

SEC. 1261. The officers of the army shall be entitled to the pay herein stated after their respective designations:

The general: thirteen thousand five hundred dollars a year.

Lieutenant-general: eleven thousand dollars a year.

Major-general: seven thousand five hundred dollars a year.

Brigadier-general: five thousand five hundred dollars a year.

Colonel: three thousand five hundred dollars a year.

Lieutenant-colonel: three thousand dollars a year.

Major: two thousand five hundred dollars a year.

Captain, mounted: two thousand dollars a year.

Captain, not mounted: eighteen hundred dollars a year.

Adjutant: eighteen hundred dollars a year.

Regimental quartermaster: eighteen hundred dollars a year.

First lieutenant, mounted: sixteen hundred dollars a year.

First lieutenant, not mounted: fifteen hundred dollars a year.

Second lieutenant, mounted: fifteen hundred dollars a year.

Second lieutenant, not mounted: fourteen hundred dollars a year.

Chaplain: fifteen hundred dollars a year.

Aid to major-general: two hundred dollars a year, in addition to pay of his rank.

Aid to brigadier-general: one hundred and fifty dollars, in addition to pay of his rank.

Acting assistant commissary: one hundred dollars a year, in addition to pay of his rank.

Ordnance storekeeper at Springfield armory: two thousand five hundred dollars a year.

All other storekeepers: two thousand dollars a year.

When the Revised Statutes took effect, *all* captains, first lieutenants, and second lieutenants throughout the whole army took rank according to date of commission or appointment. That is to say, of eight captains, belonging respectively to the infantry, artillery, cavalry, quartermaster's department, subsistence department, engineers, ordnance department, and medical department, the oldest in commission was highest in rank. A captain in either arm or corps ranked all captains in all other arms or corps junior in commission to himself. In like manner, of twelve first lieutenants or twelve second lieutenants, being respectively line officers of infantry, cavalry, or artillery, or lieutenants of engineers or ordnance, or regimental adjutants of infantry, cavalry, or artillery, or regimental quartermasters

of infantry, cavalry, or artillery, or regimental commissaries of artillery, the oldest in commission was senior in rank to whatever arm or corps he might belong.

This resulted from the provisions of sections 4 and 5 of the army regulations of 1863, which regulations were made a part of the law by the act of July 28, 1866. (United States *v.* Williamson, 23 Wall., 411.) No change has been made by the Revised Statutes, so far as this subject is concerned.

But while there is only one *rank of captain* in the whole army, there are, under section 1261 of the Revised Statutes, two grades of captain's pay, as follows: pay of captain, mounted, $2,000; of captain, not mounted, $1,800.

And while there is only one *rank* of first lieutenant or of second lieutenant in the whole army, there are three grades of pay for each, viz: for first lieutenant, mounted, $1,600; first lieutenant, not mounted, $1,500; first lieutenant, regimental adjutant, or quartermaster, $1,800; second lieutenant, mounted, $1,500; second lieutenant, not mounted, $1,400; second lieutenant, regimental adjutant or quartermaster, $1,800. So that while there are eight different kinds of captains and twelve different kinds of first and second lieutenants respectively in the army, and two rates of pay for captains, and three rates of pay for first and second lieutenants respectively, there is in the whole army only one rank of captain, one rank of first lieutenant, and one rank of second lieutenant.

There is, then, no *uniform pay* for the rank of captain, first lieutenant, or second lieutenant. A statutory provision to the effect that an officer should receive the pay of the rank of captain, or the pay of the rank of first lieutenant, or of second lieutenant, would be uncertain and inoperative if the word rank were used in the sense in which it is used in the 4th and 5th sections of the army regulations.

Now, it is provided in section 1261 of the Revised Statutes, cited above, that the pay of the acting assistant commissary shall be "one hundred dollars a year in addition to pay of his rank." To make this provision effective the word rank must be used in a sense different from that in

which it is used in the 4th and 5th army regulations. If the acting assistant commissary is a captain, say of infantry, this language cannot mean that he shall receive one hundred dollars a year in addition to the pay of the *rank of captain;* for there is no uniform pay of the rank of captain, and the language in that sense would be uncertain and inoperative. But it must mean that he shall receive one hundred dollars a year in addition to the pay of an infantry officer of the rank of captain. It must mean that he shall receive one hundred dollars a year in addition to the pay of his office. And if the acting assistant commissary is a captain of cavalry the provision must mean, not that he shall receive one hundred dollars a year in addition to the pay of the rank of captain, but that he shall receive one hundred dollars a year in addition to the pay of a cavalry officer of the rank of captain. In like manner, if the acting assistant commissary is a company first lieutenant of infantry or cavalry, or a regimental first lieutenant of infantry or cavalry, this statutory provision cannot mean that he shall receive one hundred dollars a year in addition to the pay of the rank of first lieutenant, for that would be a meaning without a meaning; but it must mean that he shall receive one hundred dollars a year in addition to the pay of his office, whether his office be that of a company or regimental first lieutenant of infantry or cavalry; that is to say, whether he be a first lieutenant of the line in the infantry or cavalry, or a first lieutenant of the regimental staff in either of those arms. It is illogical and arbitrary to abandon the strict sense of the word rank, and then assume that while the cavalry captain, or first or second lieutenant of the line, when detailed as acting assistant commissary, is to receive one hundred dollars a year in addition to his own designated pay, and not one hundred dollars in addition to the pay of an infantry officer of the same rank, yet, at the same time, the regimental adjutant or quartermaster is to receive, not one hundred dollars in addition to his own designated pay, but one hundred dollars in addition to the pay of some other officer of the same rank. But if the latter officer is to re-

ceive one hundred dollars in addition to the pay of some other officer of the same rank, how is it to be determined who that other officer is? All first lieutenants, whether of cavalry, artillery, infantry, ordnance, engineers, or the regimental staff, are of the same rank, taking precedence according to date of commission. If, then, a cavalry lieutenant, serving as acting assistant commissary, cannot be forced to accept one hundred dollars in addition to the pay of an infantry lieutenant, how can a regimental adjutant, serving as acting assistant commissary, be forced to accept that compensation?

The pay of an acting assistant commissary will therefore depend on the office which he holds when detailed for that duty, as follows:

Captain, mounted	$2,000	
Additional	100	$2,100
Captain, not mounted	1,800	
Additional	100	1,900
First lieutenant, adj't, or quartermaster	1,800	
Additional	100	1,900
First lieutenant, mounted	1,600	
Additional	100	1,700
First lieutenant, not mounted	1,500	
Additional	100	1,600
Second lieutenant, adj't, or quartermaster	1,800	
Additional	100	1,900
Second lieutenant, mounted	1,500	
Additional	100	1,600
Second lieutenant, not mounted	1,400	
Additional	100	1,500

It may be suggested that the regimental adjutants and quartermasters are not in fact regular regimental officers, but are merely company officers detailed to this duty. This is altogether erroneous. It *was* true, under the act of March 2, 1821, which did not provide for the adjutant and quartermaster as a part of the regimental organization, but only permitted details for those duties of company lieutenants whose places remained vacant while they were so engaged. The following is the provision:

"2. Each regiment of artillery shall consist of one colo-

nel, one lieutenant colonel, one major, one sergeant major, one quartermaster sergeant, and nine companies, one of which shall be designated and equipped as light artillery; and that each company shall consist of one captain, two first lieutenants, two second lieutenants, four sergeants, four corporals, three artificers, two musicians, and forty two privates. That each regiment of infantry shall consist of one colonel, one lieutenant colonel, one major, one sergeant major, one quartermaster sergeant, two principal musicians, and ten companies; each of which shall consist of one captain, one first lieutenant, one second lieutenant, three sergeants, four corporals, two musicians, and forty-two privates; and that to each regiment of artillery and infantry there shall be one adjutant, who shall be taken from the subalterns of the line." (1 Brightly's Digest, p. 55, sec. 2.)

And even such details are not *expressly* authorized by the statute, so far as regimental quartermasters are concerned.

But the following is the provision of the Revised Statutes, which was enacted in 1866:

"SEC. 1106. Each infantry regiment shall consist of ten companies, one colonel, one lieutenant colonel, one major, one *adjutant*, one *quartermaster*, one sergeant major, one quartermaster sergeant, and one chief musician, who shall be instructor of music, and two principal musicians. The *adjutant and the quartermaster shall be extra lieutenants*, selected from the first or second lieutenants of the regiment.

"SEC. 1107. Each company of infantry shall consist of one captain, one first lieutenant, one second lieutenant, one first sergeant, one quartermaster sergeant, four sergeants, four corporals, two artificers, two musicians, one wagoner, and fifty privates, and the number of privates may be increased, at the discretion of the President, not to exceed one hundred, whenever the exigencies of the service require such increase."

These last provisions, it will be perceived, make the adjutant and quartermaster a part of the regimental organization. And while they are originally selected from the company lieutenants, nevertheless they are made extra or additional lieutenants; so that as soon as they are selected and made adjutants and quartermasters, their places in the

ceive one hundred dollars in addition to the pay of some other officer of the same rank, how is it to be determined who that other officer is? All first lieutenants, whether of cavalry, artillery, infantry, ordnance, engineers, or the regimental staff, are of the same rank, taking precedence according to date of commission. If, then, a cavalry lieutenant, serving as acting assistant commissary, cannot be forced to accept one hundred dollars in addition to the pay of an infantry lieutenant, how can a regimental adjutant, serving as acting assistant commissary, be forced to accept that compensation?

The pay of an acting assistant commissary will therefore depend on the office which he holds when detailed for that duty, as follows:

Captain, mounted	$2,000	
Additional	100	$2,100
Captain, not mounted	1,800	
Additional	100	1,900
First lieutenant, adj't, or quartermaster	1,800	
Additional	100	1,900
First lieutenant, mounted	1,600	
Additional	100	1,700
First lieutenant, not mounted	1,500	
Additional	100	1,600
Second lieutenant, adj't, or quartermaster.	1,800	
Additional	100	1,900
Second lieutenant, mounted	1,500	
Additional	100	1,600
Second lieutenant, not mounted	1,400	
Additional	100	1,500

It may be suggested that the regimental adjutants and quartermasters are not in fact regular regimental officers, but are merely company officers detailed to this duty. This is altogether erroneous. It *was* true, under the act of March 2, 1821, which did not provide for the adjutant and quartermaster as a part of the regimental organization, but only permitted details for those duties of company lieutenants whose places remained vacant while they were so engaged. The following is the provision:

"2. Each regiment of artillery shall consist of one colo-

nel, one lieutenant colonel, one major, one sergeant major, one quartermaster sergeant, and nine companies, one of which shall be designated and equipped as light artillery; and that each company shall consist of one captain, two first lieutenants, two second lieutenants, four sergeants, four corporals, three artificers, two musicians, and forty two privates. That each regiment of infantry shall consist of one colonel, one lieutenant colonel, one major, one sergeant major, one quartermaster sergeant, two principal musicians, and ten companies; each of which shall consist of one captain, one first lieutenant, one second lieutenant, three sergeants, four corporals, two musicians, and forty-two privates; and that to each regiment of artillery and infantry there shall be one adjutant, who shall be taken from the subalterns of the line." (1 Brightly's Digest, p. 55, sec. 2.)

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"SEC. 1107. Each company of infantry shall consist of one captain, one first lieutenant, one second lieutenant, one first sergeant, one quartermaster sergeant, four sergeants, four corporals, two artificers, two musicians, one wagoner, and fifty privates, and the number of privates may be increased, at the discretion of the President, not to exceed one hundred, whenever the exigencies of the service require such increase."

These last provisions, it will be perceived, make the adjutant and quartermaster a part of the regimental organization. And while they are originally selected from the company lieutenants, nevertheless they are made extra or additional lieutenants; so that as soon as they are selected and made adjutants and quartermasters, their places in the

companies are closed to them, and open to assignments, appointments, or promotions, which are forthwith made, whereby the number of lieutenants is increased in infantry regiments from twenty to twenty-two and in cavalry regiments from twenty-four to twenty-six.

In conformity with this law, the infantry regiments, in the recent Army Registers exhibit twenty-two instead of twenty lieutenants, and the cavalry regiments twenty-six instead of twenty-four. But in the old Army Registers the infantry lieutenants only number twenty and the cavalry twenty-four, including the adjutant and quartermaster.

Under the old law a regimental quartermaster was a detailed, acting officer; and if he was afterwards detailed as acting assistant commissary, he at once ceased to be a regimental quartermaster, and went to his new duties merely in the character of a company lieutenant. But under the new law a regimental quartermaster is a permanent officer, and he has no other place in the regiment. His former place is filled; and if he is detailed to perform the duties of an acting assistant commissary, he goes to those duties, not in his original official character of a company lieutenant, but in the character of a regimental quartermaster.

It is true he holds the rank of lieutenant, just as the infantry lieutenant of the line holds the rank of lieutenant; just as the cavalry lieutenant of the line, or the artillery lieutenant of the line, or the lieutenant of ordnance or engineers holds the rank of lieutenant. But his office differs from theirs precisely as their offices differ from each other.

It may be urged that to pay a regimental adjutant or quartermaster, acting as assistant commissary, $100, in addition to the pay of a regimental adjutant or quartermaster, would be to allow, for the same service, a higher rate of compensation to a regimental than to a company lieutenant. But if the adjutant or quartermaster receives his adjutant's or quartermaster's pay alone while acting as assistant commissary, without the addition of the

$100, he receives more than the company lieutenant for the same service. His pay is $1,800; while for the same service the first lieutenant, mounted, receives $1,700; not mounted, $1,600; the second lieutenant, mounted, $1,600; not mounted, $1,500. Besides, if a captain is detailed, as he may be, to act as assistant commissary, he will receive, if mounted, $2,100; if not mounted, $1,900, for the same service for which a company second lieutenant of infantry can only receive $1,500. Indeed, a major general commanding a division receives $7,500, while a colonel, for the same service, receives only $3,500. If, therefore, the resulting inequality of compensation is to defeat the statute in its application to quartermasters and adjutants, so also is it, on the same ground, to defeat the statute in its application to all officers eligible to detail to the duty of acting assistant commissary, except the second lieutenant of infantry, who receives the lowest rate of pay.

This view of the effect of the statute is confirmed by the provision of section 1261, which fixes the rates of pay of officers of the army. In that section the acting assistant commissary is, in the regulation of his pay, treated not as a permanent, but as a detailed or acting officer. His pay is not fixed at $2,100, or $1,900, or $1,700 a year; but at $100 in addition to the pay of his rank. But, on the other hand, the pay of the regimental adjutant and regimental quartermaster is fixed at an absolute rate and not by the addition of some designated amount to the pay of the officers from whom he was originally detailed. So the regimental adjutant and quartermaster are by this section regarded as regular permanent officers, and not as acting detailed officers; they are regarded, not as officers out of their own proper places, to be sent back when their temporary duty ends, but as officers in their own proper places, to remain there until called thence by such exigencies of the service as would in like circumstances call for the transfer of any other regular or permanent officers.

Under the old law this was all different, so far as the pay of the regimental adjutant and quartermaster were con-

cerned. By the act of March 16, 1802, their pay was not fixed at a designated amount, but there was allowed "to each adjutant ten dollars in addition to his pay in the line." (1 Brightly's Dig., p. 84, sec. 286.) And by the act of April 12, 1808, there was allowed "to each adjutant, regimental quartermaster, and paymaster ten dollars per month in addition to their pay in the line." (1 Brightly's Dig., p. 84, sec. 290.) And inasmuch as the act of 1821 did not make the adjutant or quartermaster a regular, permanent officer of the regiment, but made him an acting detailed officer, and left his place in the company vacant until he returned to it, the old law was consistent with itself when it came to provide for the pay of these officers, for it paid them, not as permanent officers by awarding a fixed salary, but as acting officers by awarding them a mere addition to their line pay.

Now, the pay of an acting assistant commissary is that which the law prescribes, and not that which an executive officer may see fit to allow. The law prescribes for the "acting assistant commissary one hundred dollars a year in addition to pay of his rank." That, and nothing else, is his lawful pay. An acting assistant commissary, who is a regimental quartermaster and first lieutenant of infantry, unless he is entitled to $1,900 per annum, (being $100 per annum in addition to his quartermaster's pay of $1,800,) is only entitled to $1,600, being $100 in addition to the pay of a company first lieutenant of infantry or to $1,700, being $100 in addition to the pay of a company first lieutenant of cavalry. And the absurd result is reached that a regimental quartermaster of infantry, promoted by detail to the more difficult and responsible duty of acting assistant commissary, finds his pay not only not increased, but actually reduced from $1,800 to $1,700.

It will not do to say that the paymaster may remedy this inconvenience by allowing the acting assistant commissary to retain his quartermaster's pay of $1,800. The law and not the paymaster's discretion governs the case. And under the law the acting assistant commissary in the case supposed

is entitled either to $1,900 or only to $1,700. He is entitled to "one hundred dollars a year in addition to pay of his rank," *and to nothing else.* If he is only entitled to $1,700, being $100 in addition to the pay of a first lieutenant, mounted, the paymaster has no more authority to make him a gift of $100 of the public money, than he has to withhold $100, if he is entitled to $1,900. If, notwithstanding this provision of the statute, the paymaster may allow to the acting assistant commissary the pay of regimental quartermaster, then the statute is not of universal application. It applies to company lieutenants, but not to regimental lieutenants. For the company lieutenants, whose want of experience in such duty renders their details to the service of acting assistant commissary of rare occurrence, the law is operative. But when regimental lieutenants, who, in nine cases out of ten, become acting assistant commissaries, are to be detailed, the statute is a dead-letter. They are not to receive $100 in addition to the pay of a company lieutenant, either mounted or not mounted; but they are to receive the exact pay of the regimental lieutenant, without increase or diminution. There is nothing in the letter or spirit of the statute to warrant the view that it was intended to be a nullity in nine out of ten of the cases for which it purports to provide. The only construction that can render the statute effective and consistent is that the regimental quartermaster, say, of infantry, who serves as acting assistant commissary is entitled to $100 in addition to the pay, not of a lieutenant of infantry, or cavalry, or artillery, or ordnance, or engineers, but of a regimental quartermaster.

But assuming the claimant's position of an acting commissary of subsistence to have been a staff appointment, he does not ask for the pay of two staff appointments, but only for that of one. He asks for the pay of an acting commissary of subsistence. The law provides one rate of pay for one of these appointments, and a different rate of pay for the other. It provides $1,800 per annum for the former and $1,900 per annum for the latter. It is true that, in making up the latter, it adds $100 per annum to the com-

pensation of the former, but that is in effect as if it made it up by adding $1,800 and $100 together. It is not true that the acting commissary of subsistence takes the $100 as the pay of that appointment, and the $1,800 as the pay of the regimental quartermaster; but he takes the whole $1,900 as the pay of the appointment of acting commissary of subsistence. That is what the statute provides. He may not be required to perform any service for that compensation, except as acting commissary of subsistence. He is entitled to the pay if he does nothing as regimental quartermaster. He may, at the command of his superior officer, wholly drop his duties as regimental quartermaster, and yet while acting as commissary of subsistence he is entitled to the compensation of that office, fixed by law at $1,900. If at the same time he performs also the duties of regimental quartermaster, his service as regimental quartermaster is a gratuity to the Government. If he were to receive the pay of both appointments, the amount would be not $1,900, nor $1,800, but $3,700, the sum of both.

When the regulations of 1863 were adopted, and until the enactment of the Revised Statutes, the system of payment of staff officers was very different. Then the regimental adjutant and the regimental quartermaster were, as we have seen, line officers detailed for staff duty, and while they acted as staff officers their line offices remained vacant for them, and they returned to them at the expiration of the detail. But under the new statute, these officers, as soon as detailed, become permanent staff officers, and cease to be line officers. Their places in the line are filled by new appointments. In this particular case the appellee, when he was appointed regimental quartermaster, immediately ceased to be a line officer, and his place in the line was filled by a new commission. Under the old system, the adjutant and quartermaster being line officers detailed for staff duty, received each not a fixed salary as now, but $10 per month in addition to his pay as an officer of the line, and the effect of the regulation, when in force, was to provide that when one line officer held two such positions at

the same time, he should not receive $10 in addition to his line pay for the performance of one class of duties, and $10 more for the performance of the other. Suppose, now, that the regulations of 1863 are still in force. The adjutant being no longer a line officer, receives a fixed compensation, and the quartermaster being no longer a line officer, also receives a fixed compensation. And the rule applied to them would, of course, prevent the adjutant, serving as a quartermaster, from receiving $3,600 per annum, the compensation of both offices, which would be double his lawful pay. And the same principle applied to an adjutant or quartermaster detailed to serve as acting commissary of subsistence, would prevent him from receiving pay for both offices, which would amount to $3,700 per annum, and would permit him to receive only the pay of the latter office, amounting to $1,900 per annum.

But then it is not certain that the regulations of 1863, so far as they depend for their validity upon congressional action, were in force when this claim accrued; for, by section 5596 of the Revised Statutes, it is provided that "all acts of Congress passed prior to said 1st day of December, 1873, any part of which is embraced in the revision, are hereby repealed." And although a large part of the act of July 28, 1866, was incorporated into the Revised Statutes, yet the 37th section, by which the regulations of 1863 had been enacted into a law, was omitted.

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